No. 02-1028

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY, PTY LTD., d/b/a KIRBY ENGINEERING, and ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL CARGO LOSS PREVENTION, INC. IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE*

International Cargo Loss Prevention, Inc. ("ICLP") respectfully submits this brief as *amicus curiae* in support of the respondents. Petitioner and respondents have consented to the filing of this brief, and their attorneys' letters granting consent are filed of record.[1]

INTEREST OF *AMICUS*

Amicus is an organization committed to preventing cargo loss. Its prevention efforts include conducting claims investigations and providing mitigation services to all participants in international trade.

It is interested in the resolution of the present case because "Himalaya" clauses relieve tortfeasors of liability for cargo losses and thereby promote rather than discourage negligence.

Amicus accordingly files this brief urging this Court to affirm the Eleventh Circuit's decision on the ground that third parties who are not carriers under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315 (1936), are not entitled to the benefit of COGSA's limitation-of-liability provisions, including the $500 per package limitation in COGSA § 4(5), 46 U.S.C. App. § 1304(5). COGSA carriers should not have the right to extend

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

COGSA's limitation-of-liability provisions contractually to third parties, and shippers should be entitled to fully recover their cargo damage losses from any third party tortfeasor who is not a COGSA carrier.

Amicus has a particular interest in the second question presented in the petition:

> 2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

The unstated premise of that second question is that certain types of "Himalaya" clauses would be enforceable if confined to independent contractors in privity with the carrier issuing the bill of lading. But that premise is flawed. For numerous reasons grounded in COGSA, general maritime law, and public policy, no "Himalaya" clause should be enforceable. In other words no third-party contractor – whether or not in privity with the carrier issuing the bill of lading – should receive the benefit of COGSA's limitation-of-liability provisions.

This Court has not sanctioned a COGSA carrier's use of "Himalaya" clauses to extend COGSA limitation-of-liability provisions to non-COGSA carriers. In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, this Court declined to extend COGSA limitations to a stevedore that was not a COGSA carrier where the bill of lading mentioned only the carrier as the beneficiary of the limitation provisions. 359 U.S. 297, 301-303 (1959). As noted by the

Court of Appeals below, however, courts have nonetheless read *Herd* to leave "open the possibility that a clause in a bill of lading could limit the liability of parties hired by the carrier, if drafted with sufficient clarity to specifically identify those parties." *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway*, 300 F.3d 1300, 1307 (11th Cir. 2002). "Subsequent cases made that possibility a reality," the Court of Appeals notes, and "[t]oday Himalaya clauses are standard fare in bills of lading." *Id.* at 1307.

But the assumption that *Herd* "left open the possibility that a clause in a bill of lading could limit the liabilities of parties hired by the carrier," *id.*, has never been examined much less approved by this Court. Though "Himalaya" clauses have indeed become "standard fare in bills of lading," *id.*, that is not to say that they are valid or should be enforced. What is more, this Court's decision in *United States v. Atlantic Mutual Insurance Co.* supports a *per se* rule prohibiting the use of "Himalaya" clauses to relieve third parties who are not COGSA carriers of liability for their negligence, absent an immunity from liability expressly granted by Congress. 343 U.S. 236, 242 (1952).

Should this Court therefore conclude, as *amicus* urges, consistent with the Court's prior decisions, that COGSA, general maritime law, and principles of public policy prohibit the extension of COGSA limitation provisions to third parties, then the issue of contract construction presented in the second question would be moot. *No* independent contractor of a COGSA carrier – whether or not in privity with the carrier and regardless of the wording of the "Himalaya" terms in the carrier's bill of lading – would be entitled to enforce the "Himalaya" limitation

provisions in the bill of lading. *Amicus* urges this Court to affirm the decision below on that basis.

SUMMARY OF ARGUMENT

This Court should invalidate "Himalaya" clauses in bills of lading that purport to extend COGSA limitation-of-liability provisions to third parties who are not COGSA carriers. First, "Himalaya" clauses are not authorized by COGSA. In enacting COGSA Congress extended limitation-of-liability rights only to COGSA carriers. Congress did not authorize COGSA carriers themselves to extend COGSA's limitation-of-liability provisions to third parties who are not COGSA carriers, and private parties cannot "legislate" where Congress has not done so. Allowing COGSA carriers to extend COGSA limitation provisions to third parties tips the scales radically in favor of COGSA carriers and their agents and servants, greatly to the prejudice of shippers who are thereby deprived of customary tort remedies against negligent parties. Second, "Himalaya" clauses are contrary to the controlling general maritime law rule that prohibits common carriers from stipulating for the immunity of their agents and servants from liability for cargo damage. This Court has never carved out an exception to that general maritime law rule to permit a COGSA carrier to use "Himalaya" provisions to limit the liability of the carrier's agents and servants. Third, "Himalaya" clauses contravene the important public policy that tortfeasors should be liable for damages caused by their negligence.

ARGUMENT

A. Himalaya Clauses are Contrary to COGSA.

In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-303 (1959), this Court noted that nothing in the provisions, legislative history and environment of COGSA evidences any Congressional intent to limit the liability of negligent agents of a carrier. "It must be assumed," this Court observed, "that Congress knew that generally agents are liable for all damages caused by their negligence." *Id.* at 302. "'We can only conclude,' the Court added, 'that if Congress had intended to make such an inroad on the rights of claimants [against negligent agents], it would have said so in unambiguous terms' and 'in the absence of a clear Congressional policy to that end, we cannot go so far.'" *Id.* (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581 (1943)). It follows that not only does COGSA not authorize "Himalaya" clauses, but the enactment of COGSA evinces Congressional intent not to extend COGSA limitation provisions to third parties who are not COGSA carriers.

When Congress afforded COGSA immunities and liabilities to COGSA carriers, it did so pursuant to a carefully constructed legislative scheme that struck a fair balance between the rights and obligations of shippers, on the one hand, and *carriers* on the other hand. "Himalaya" clauses upset that legislative balance by extending COGSA benefits to third parties not intended by Congress to have such benefits, thereby needlessly and unfairly depriving shippers of customary tort remedies against negligent parties causing cargo damage.

While *Herd* notes that the limitation-of-liability provisions in the bill of lading contract in that case also

did not indicate any intention on the part of the contracting parties to limit the liability of negligent agents of the carrier, 359 U.S. at 302-303, this Court did not suggest, much less hold, that bill of lading provisions *could* validly limit the liability of negligent agents of the carrier. The numerous "Himalaya" clauses in bills of lading that have emerged in the wake of *Herd* are therefore neither authorized by COGSA nor, strictly speaking, foreshadowed by this Court's decision in *Herd*.

"Himalaya" clauses relieving third parties of liability for negligence are also contrary to section 3(8) of COGSA, 46 U.S.C. App. § 1303(8), which provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

While COGSA § 3(8) literally addresses only the liability of the carrier and the ship, the plain thrust of that section is to prohibit bill of lading provisions that lessen the liability provisions of COGSA viewed as a whole. *See, generally, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534-539 (1995). Because a COGSA carrier cannot by virtue of section 3(8) lessen its liability to a shipper otherwise than as provided in COGSA, it follows that a COGSA carrier cannot limit the liability of its agents and servants in a manner not authorized by COGSA. *See Herd*, 359 U.S. at 302 ("Yet Congress, while limiting the liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents of a carrier."); *see also* Harter Act § 1, 46

U.S.C. App. § 190 (prohibiting carrier from making provision in a bill of lading that seeks to absolve owner or operator of vessel for negligence).

Furthermore, this Court in *Herd* ruled that agents of the carrier performing bill of lading services for the carrier are not as a matter of law entitled to limit their liability to the same extent as the carrier, specifically observing that "[f]rom its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a *valid* contract binding on the person damaged." 359 U.S. at 770 (emphasis added). Himalaya provisions purporting to immunize agents or servants of the carrier in whole or in part from liability resulting from their negligence are not "valid" in the light of COGSA.

B. Himalaya Clauses are Contrary to The General Maritime Law.

In *Atlantic Mutual*, this Court observed that "[t]here is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence." 343 U.S. at 239. "While this general rule was fashioned by the courts," this Court added, "it has been continuously accepted as a guide to common carrier relationships for more than a century and has acquired the force and precision of a legislative enactment." *Id.*

In invalidating the "Both-to-Blame" clause in a carrier's bill of lading, this Court in *Atlantic Mutual* enforced "the controlling rule that without congressional authority [carriers] cannot stipulate against their own negligence or that of their agents or servants." *Id.* at 242. Himalaya provisions are "stipulat[ions] for immunity," *id.*

at 239, entirely lacking in "congressional authority," *id.* at 242, and therefore contravene the general maritime law rule prohibiting carriers from relieving their agents of liability for their negligence.

Herd does not qualify or limit the controlling general maritime law rule recognized and applied in *Atlantic Mutual*. In *Herd*, this Court noted that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'" 359 U.S. at 305 (quoting *Boston Metals Co. v. Winding Gulf*, 349 U.S. 122, 123-125 (1955) (Frankfurter, J. concurring)). It is on the basis of that *dictum* that "Himalaya" clauses have become "standard fare in bills of lading." *Kirby*, 300 F.3d at 1307.

But that *dictum* is not – as the resulting "Himalaya" clause jurisprudence suggests – *de facto* authorization for carriers to "stipulate for immunity from their own or their agents' negligence," *Atlantic Mutual*, 343 U.S. at 239. The "Himalaya" clause jurisprudence that has developed following *Herd* rests on the faulty premise that this Court sanctioned the contractual extension of COGSA limitation provisions to non-COGSA carriers, when in fact this Court never did so.

In referring in *Herd* to the rule of strict contract construction, this Court was simply noting why the majority ruling in the *Collins* case was contrary to common law rules of strict contract construction. *See Herd*, 359 U.S. at 305. This Court, *amicus* respectfully suggests, was *not*

carving out an exception to the general maritime law rule recognized and applied in *Atlantic Mutual* prohibiting common carriers from stipulating against the liability of their agents unless authorized by Congress to do so. To the extent that the passage from *Herd* concerning strict contract construction suggests any departure from *Atlantic Mutual*, this Court should step in, reaffirm the continuing vitality of the prohibitory *Atlantic Mutual* general maritime law rule, and invalidate "Himalaya" clauses altogether.

Though viewing *Herd* to authorize the extension of contractual limitation-of-liability clauses to non-carriers, the Courts of Appeals have nonetheless noted the public policy reasons why contractual clauses should not be enforced. Thus, for example, in *Grace Line, Inc. v. Todd Shipyards Corp.*, the Court of Appeals ruled that "*Herd* stands for the proposition that clear and express language in the contract is the *sine qua non* for altering the common law; but when that requirement is met, it is still open for the courts to decide whether a particular alteration is contrary to public policy." 500 F.2d 361, 373 (9th Cir. 1974). "*Herd* did *not* imply," the Court of Appeals added, "that a contract, if clear and express in its intent, would be adequate to alter any familiar rule of tort liability whatsoever." *Id.* (emphasis in original). Applying that rule, *Grace Line* invalidated a contract clause purporting to wholly immunize a non-COGSA carrier from liability, in the process distinguishing a "Himalaya" clause that limited a stevedore's liability to the COGSA $500 per package. *Id.* (citing *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 438, 443 (9th Cir. 1974)).

But the *Grace Line* distinction between a COGSA immunity from liability and a COGSA limitation of liability is unfounded. The COGSA $500 package limitation is not valid simply because it is a limitation of, as opposed to a blanket immunity from, liability. *Grace Line*, 500 F.2d at 373. The dispositive point is that *Herd*, in the light of *Atlantic Mutual*, does not sanction the application of COGSA's $500 package limitation-of-liability provisions to non-COGSA carriers. *Herd* does not silently roll back the rule of *Atlantic Mutual* prohibiting carriers from stipulating against the negligence of their agents and servants or render *Atlantic Mutual* "inapposite" to the validity of a "Himalaya" clause. *See Tessler Bros.*, 494 F.2d at 443. "Himalaya" clauses in short simply cannot be squared with the general maritime law rule that negligent parties *should* be responsible for the consequences of their negligence, absent a statutory immunity from liability. And it is "still open for the courts to decide whether a particular alteration" of the common law, in the words of the Ninth Circuit, "is contrary to public policy." *Grace Line*, 500 F.2d at 373.[2]

C. Himalaya Clauses are Contrary to Public Policy.

Himalaya clauses purporting to extend COGSA package limitations to negligent non-COGSA carriers

[2] That limitation clauses are nonetheless frequently *de facto* exoneration clauses is evident here where the railroad seeks to limit its liability to $5,000 – less than one third of one per cent of the total damages of $1.5 million. That disparity is so massive as to make the Himalaya clause in this case a virtual exoneration clause, rather than simply a limitation-of-liability provision.

must be viewed in the light of the paramount public policy that tortfeasors must be responsible for their actions. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441-42 (1889). "[T]he doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void." *Id.* The rule prohibiting stipulations against negligence is so entrenched that it has "acquired the force and precision of a legislative enactment." *Atlantic Mutual*, 343 U.S. at 239; *see also Brady*, 317 U.S. at 580 ("The liability of an agent for his own negligence has long been embedded in the law."). "Himalaya" clauses should therefore be *per se* unenforceable, at least until such time as Congress shall have expressly authorized them.

A *per se* rule prohibiting the extension of COGSA package limitations to non-carriers – mandated by *Atlantic Mutual* and not foreclosed by *Herd* – promotes the sound and long-standing public policy demanding that negligent parties bear full responsibility for the consequences of their actions. Himalaya clauses perversely promote negligence. They relieve negligent parties of responsibility for their conduct, thereby encouraging tortfeasors to disregard appropriate standards of care.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed on the ground that "Himalaya" clauses purporting to extend COGSA limitation-of-liability provisions to third parties who are not COGSA carriers are invalid.

Respectfully submitted,

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